No. 84-1915

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

F.E.L. PUBLICATIONS, LTD.,

Petitioner,

v.

CATHOLIC BISHOP OF CHICAGO,

Respondent.

BRIEF OF RESPONDENT CATHOLIC BISHOP OF CHICAGO IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the federal courts below properly interpret the damage provisions of the now repealed 1909 Copyright Act, 17 U.S.C. §§ 1-216 (1976), in denying Petitioner's demand to substitute $1.5 million statutory damages for the jury's award of $190,400, which was the amount Petitioner requested from the jury?

2. Did the district court properly exercise its judicial discretion under the now repealed 1909 Copyright Act in denying Petitioner's request for $1.5 million in statutory damages in lieu of the jury's award of $190,400 (requested by the Petitioner) in actual damages?

3. Did the court of appeals properly interpret Illinois law in holding that the parishes within the Archdiocese are not separate and independent legal entities, but are subsumed under the Catholic Bishop?

IDENTIFICATION OF PARTIES PURSUANT TO SUPREME COURT RULES 28.1 AND 34.2

The caption of the case in this Court contains the names of all parties. Petitioner Catholic Bishop of Chicago is a corporation sole organized pursuant to a special act of the Illinois legislature. It does not have the traditional corporate affiliates and subsidiaries but it operates approximately 446 Catholic parishes, 4 Catholic seminaries, 374 Catholic elementary and secondary schools, 5 Catholic homes for the aged, and other Catholic institutions and programs.

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SUPPLEMENTAL STATEMENT OF THE CASE

The facts are stated in the court of appeals decision. However, because Petitioner's statement of the case omits or distorts some of the key facts, we restate:

The Respondent Catholic Bishop of Chicago is the legal entity of the Roman Catholic Archdiocese of Chicago. The Catholic Bishop is a corporation sole organized under a special act of the Illinois legislature. Private Laws of Illinois, 22nd General Assembly, at 78 (1861). The Catholic Bishop owns all property within its 447 parishes in the Archdiocese. *Id.* (App. 9a.)[1].

[1] Appendix (App.) refers to the Appendix to Petitioner's Petition for a Writ of Certiorari.

The Petitioner, F.E.L. Publications, Ltd., is a publisher of religious music. Formed in the early 1960s, F.E.L. published collections of English liturgical hymns in a predominantly folk music repertoire. F.E.L.'s President, Dennis Fitzpatrick, authored some of the songs while others were obtained from various composers through assignments to F.E.L. of exclusive rights to songs in exchange for royalties on the sale of F.E.L. materials. (App. 2a.)

The Copyright Suit

In September of 1976, F.E.L. Publications, Ltd. sued the Catholic Bishop of Chicago for copyright infringement under the 1909 Copyright Act, 17 U.S.C. §§ 1-216 (1976). (App. 2a.) F.E.L. sought damages for the unauthorized copying of hymns by 238 of the 447 parishes in the Archdiocese of Chicago. The Catholic Bishop himself neither participated in nor was aware of any copying of F.E.L. materials in his parishes. F.E.L. sought damages from the Bishop because he is the civil and canon law head of the Roman Catholic Archdiocese of Chicago and is accountable as the principal or "owner" for the acts of all his parishes. The parishes have no independent legal identity. (App. 9a.)

At trial, F.E.L. asked the jury for the precise sum of $190,400 for its copyright damages; F.E.L. computed its damages by multiplying F.E.L.'s $100 license fee per parish over a three year period plus a $500 penalty times the 238 infringing parishes. The jury awarded F.E.L. the exact amount requested, $190,400. (App. 3a.) The Bishop promptly paid the judgment. In a post-trial motion, F.E.L. asked the district court to withdraw the jury's $190,400 award it had requested and to substitute therefor $1.5 million in statutory damages. (App. 3a-4a.) The trial court ruled that statutory damages were discretionary and denied the request, (App. 4a), holding that the $190,400 was adequate compensation. (App. 13a.) F.E.L. then appealed the court's refusal to award F.E.L. more than the $190,400. The United States Court of Appeals for the Seventh Circuit affirmed the district court's decision as not an abuse of the district court's discretion. (App. 8a.)

The Tortious Interference Suit

On the day the lawsuit was filed, F.E.L. held a press conference and accused the Catholic Bishop of Chicago of liturgical piracy and "Watergate worship." F.E.L. also sent a letter to every Catholic Bishop in the United States informing them of the suit and threatening additional suits if the Bishops failed to come to terms with F.E.L. for their copying.

Shortly after filing its copyright suit, F.E.L. sought an injunction prohibiting the destruction and continued use of any unauthorized copies of F.E.L. hymns by parishes in the Archdiocese of Chicago. (App. 3a.) In order to avoid any additional liability for the acts of his parishes, the Catholic Bishop agreed to collect all of F.E.L.'s publications in the Archdiocese, as requested by F.E.L. The Bishop also by two letters directed its parishes not to use or purchase F.E.L. materials until the lawsuit had been resolved. (App. 3a.)

The Catholic Bishop of Chicago received numerous inquiries about the lawsuit from its fellow Catholic Bishops outside the Archdiocese of Chicago. The Bishops had been informed of the dispute by Petitioner's press conference and the letters Petitioner sent to each Bishop. In response to those inquiries, the Catholic Bishop sent all his fellow Bishops copies of the two letters sent to Chicago parishes directing the collection and non-use of F.E.L. materials held in the parishes and owned by the Bishop. (App. 3a.)

Six months later, F.E.L. amended its complaint to seek additional compensatory and punitive damages, alleging that the Catholic Bishop of Chicago had tortiously interfered with F.E.L.'s business relationship with the Chicago Catholic parishes because the Bishop collected F.E.L. materials and prohibited their use in its own parishes during this litigation. (App. 3a.) In contrast to F.E.L.'s copyright claim, that sought to impose vicarious liability on the Catholic Bishop for the copying by its parishes as the Bishop's agents, F.E.L.'s tortious interference count treated the Bishop and its parishes as separate entities; the parishes for F.E.L.'s tortious interference count were al-

leged to be independent third parties that allegedly had the legal capacity to maintain a separate business relationship with F.E.L. (App. 9a.) F.E.L. also claimed that the Catholic Bishop interfered with F.E.L.'s business relationships nationwide by sending copies of its two letters to Chicago parishes to answer the inquiries of its fellow Bishops regarding this lawsuit. (App. 3a.)

The evidence presented at trial demonstrated that the parishes in the Archdiocese are not independent legal entities but are part of the corporation sole owned and controlled by the Catholic Bishop. Moreover, the plaintiff offered no evidence of the loss of a single contract or relationship with any parish outside of the Archdiocese of Chicago due to the Catholic Bishop's conduct. Nevertheless, the district court submitted both of these claims to the jury which then awarded the plaintiff $2 million in compensatory damages and $1 million in punitive damages for tortious interference. (App. 2a, 9a.)

The Catholic Bishop appealed the $3 million tortious interference judgment on the ground that the Catholic Bishop could not, as a matter of Illinois law, tortiously interfere with its own parishes, and that there was no evidence to support a finding that the Catholic Bishop of Chicago tortiously interfered with F.E.L.'s business relationships nationwide. The court of appeals vacated the $3 million award because the jury reached its verdict after considering the Catholic Bishop's actions with its own parishes contrary to Illinois law. (App. 9a.) The court of appeals held that under Illinois law the parishes were subsumed within the Catholic Bishop. (App. 9a.) It remanded the case, however, for further proceedings with respect to F.E.L.'s claim that the Catholic Bishop of Chicago tortiously interfered with F.E.L.'s business nationwide. (App. 10a.)

REASONS TO DENY THE WRIT

The petition for certiorari should be denied because the only federal question presented concerns the construction of the "in lieu of" statutory damages provision of the 1909 Copyright

Act, 17 U.S.C. § 101(b) (1976), a statute that is no longer the law. Moreover, the federal question presented is solely whether the district court, which heard all of the witnesses and evidence, abused its discretion in denying statutory damages in lieu of actual damages under the 1909 Copyright Act. The Seventh Circuit without dissent determined that there was no abuse of the trial court's discretion, especially because all the trial court did was calculate petitioner "F.E.L.'s damages according to the method F.E.L. suggested." (App. 7a.)

This Court should not use its precious resources to construe a statute that has been repealed and superseded by the 1976 Copyright Act. 17 U.S.C. § 504 (1982). Not only was the question rightly decided by both lower courts in accordance with this Court's 1909 Copyright Act decision in *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228 (1952), but the question will never arise again. There is no need to provide guidance to the lower federal courts as to how to exercise discretion under the 1909 Copyright Act, and this Court has no reason to review the Seventh Circuit's correct interpretation of the Illinois law of tortious interference.

Accordingly, there being no important federal question and no conflict between the decisions of the circuits or of this Court, the writ should be denied.

I.

THE FEDERAL COURTS BELOW PROPERLY INTERPRETED THE DAMAGE PROVISIONS OF THE 1909 COPYRIGHT ACT IN DENYING PETITIONER'S REQUEST FOR STATUTORY DAMAGES.

A. The Construction Of A Repealed Statute Does Not Present An Important Federal Question.

F.E.L.'s claim arose under the 1909 Copyright Act which has been superseded by the 1976 Copyright Act. The damage

provisions of the 1909 Copyright Act required the plaintiff to prove damages and lost profits, and provided that the trial judge may award "*in lieu of* actual damages and profits, . . . such [statutory] damages the court may, in its *discretion*, allow." 17 U.S.C. § 101(b) (1976) (emphasis added). Congress deleted the "in lieu of" provision—the language that forms the basis of Petitioner's federal question—in the 1976 Copyright Act. The 1976 Copyright Act, like the 1909 Copyright Act, allows a copyright plaintiff to collect actual damages or lost profits, while the new act, in marked contrast to the old, now provides that a plaintiff may "*elect at any time before a final judgment* is rendered, to recover . . . an award of statutory damages." 17 U.S.C. §§ 504(b), (c) (1982) (emphasis added).

Thus, the issue of whether a court had reasons to exercise its discretion to award statutory damages and whether there was an abuse of that discretion will not arise again. Under the new act whether statutory damages should be awarded in the first instance is now a matter exclusively of the plaintiff's election. The review and interpretation of a court's discretion under a superseded 1909 statute does not involve a novel or important federal question that warrants this Court's review.

B. The Court Of Appeals Correctly Held That The District Court Did Not Abuse Its Discretion Under *Woolworth* In Denying Statutory Damages.

In *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952), this Court held that statutory damages under the 1909 Copyright Act are not available where, as here, both actual damages and an infringer's wrongful profits can be determined. *See* 4 Nimmer on Copyright, Appendix 16 at 16-8. Indeed, under the 1909 Copyright Act statutory damages were traditionally awarded solely in instances where damages were difficult to calculate, *Peter Pan Fabrics, Inc. v. Jobela Fabrics, Inc.*, 329 F.2d 194, 197 (2d Cir. 1964), and not as here where

the Petitioner tendered a formula for its damages that would fully compensate it and the Petitioner's formula was adopted in the award *en toto* as requested.

At trial, F.E.L. established the value of the right to copy and use its works through its Annual Copyright License ("ACL") of $100 per parish per year. By this measure, F.E.L.'s actual damages totaled no more than $71,400 (238 parishes x $100 x 3 year statute of limitations period). F.E.L. presented this formula to the jury and then asked the jury to award another $500 per parish, the cost of F.E.L.'s Copying Release, which included a "penalty assessment" for any prior copying. "[P]rofits to the Catholic Bishop" were not at issue, (App. 6a), because there was no evidence that any parish within the Archdiocese ever *sold* (as contrasted to made and used) an infringing F.E.L. hymnal. *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago,* 506 F. Supp. 1127, 1131 n.2 (N.D. Ill. 1981). The jury's verdict of $190,400 thus represented the precise amount of actual damages requested of it by F.E.L. for copyright infringement.

F.E.L.'s post-trial claim that the trial court abused its discretion by refusing to award $1.5 million in statutory damages in lieu of the jury's award of $190,400 is disingenuous. It is in fact overreaching for F.E.L. to suggest in a post-trial motion that it is entitled to almost ten times the actual damages it requested, and then received, from the jury. The "in lieu of" provision of the 1909 Act expressly provides that statutory damages "shall not be regarded as a penalty." 17 U.S.C. § 101(b) (1976). As the Seventh Circuit succinctly stated, "[w]e fail to see how the trial judge abused his discretion by calculating F.E.L.'s damages according to the method F.E.L. suggested." (App. 7a.)

Furthermore, *Woolworth* instructs the trial court to consider the "circumstances of infringement" when presented with a motion for statutory damages. *Woolworth,* 344 U.S. at 232.

One such "circumstance" is the Petitioner's ten year delay in filing his lawsuit. (App. 7a.) F.E.L. could have mitigated its damages substantially by filing suit earlier. The appeals court properly concluded the trial court's consideration of F.E.L.'s delay was another valid consideration in rejecting F.E.L.'s request for $1.5 million in statutory damages. (App. 7a.)

Nor does the trial court's gratuitous comment about F.E.L.'s $1 million punitive damage award for tortious interference alter the fact that F.E.L. "received the award of [copyright] damages in the amount it claimed and as supported by the evidence." (App. 8a.) F.E.L. received exactly what it requested from the jury, and, as the Seventh Circuit held, the trial court's refusal to award statutory damages was a judicious use of its discretion.

Finally, F.E.L. is in total error in making the claim that the courts below created an "ecclesiastical use" exception to the 1909 Copyright Act to bar F.E.L. from recovering the Bishop's profits. The Seventh Circuit did not hold that the religious use of F.E.L.'s music precluded F.E.L. from recovering profits. (Indeed, in an earlier appeal the Seventh Circuit, consistent with other courts of appeal, made it abundantly clear that the Bishop's ecclesiastical use was not a barrier to F.E.L.'s recovery. (App. 18a-19a; *Wihtol v. Crow,* 309 F.2d 777 (8th Cir. 1962).) The dispositive and undisputed fact is that the Bishop and the Chicago parishes never sold an infringing copy, and there were thus *no* infringer profits for F.E.L. to recover. The failure of the Bishop to sell any infringing materials, and not the religious nature of the Respondent, was the pivotal decisional fact.

II.

THE CATHOLIC BISHOP CANNOT, AS A MATTER OF ILLINOIS LAW, TORTIOUSLY INTERFERE WITH ITS OWN CONTRACTS.

F.E.L.'s tortious interference claim is purely a matter of a cause of action under Illinois law. The Seventh Circuit properly concluded that under Illinois law a party cannot be "liable in tort for interfering with its own contract." (App. 8a.) Applying Illinois law, the Seventh Circuit found the parishes are subsumed under the Archdiocese of Chicago, *Galich v. Catholic Bishop of Chicago,* 75 Ill. App. 3d 538, 394 N.E.2d 572, 575 (1st Dist. 1979), *cert. denied,* 455 U.S. 916 (1980), and that lack of an independent third party precluded F.E.L.'s action for tortious interference.[2] (App. 9a.)

There is no reason for this Court to become involved in a state law tortious interference issue and become entangled in the hierarchy and structure of the Catholic Church in Chicago. Therefore, the Petitioner's request for a writ of certiorari should be denied.

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[2] In an argument never raised in the courts below, Petitioner asks this Court to consider canon law to determine whether the parishes are independent civil law entities. But such a determination flies in the face of well-settled Illinois law concerning the non-independent status of Chicago parishes and conflicts with this Court's longstanding position of neutrality regarding internal church affairs. *See* Watson v. Jones, 80 U.S. (13 Wall) 679 (1872); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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